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No. 91-524

**IN THE SUPREME COURT
OF THE UNITED STATES
1991 TERM**

TONI WILSON . . . . . .PETITIONER

v.

LEDGER D. KAUFFMAN . . . . . .RESPONDENT

APPEAL FROM THE INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

George E. Buckingham
Counsel of Record for Respondent
John D. Ulmer, Attorney for Respondent
Craig M. Buche, Attorney for Respondent
YODER, AINLAY, ULMER & BUCKINGHAM
130 N. Main Street, P.O. Box 575
Goshen, IN 46526
(219) 533-1171

QUESTION PRESENTED FOR REVIEW

Whether the due process and equal protection guarantees of the Constitution are satisfied when the only black venireman at a black litigant's civil trial is removed by a peremptory challenge which is sustained by the trial court after opposing counsel gave multiple racially neutral reasons for the exercise of the peremptory challenge?

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TABLE OF AUTHORITIES

CITATIONS OF OPINIONS AND JUDGMENTS IN COURTS BELOW

The opinion of the court below is cited as Wilson v. Kauffman, 563 N.E.2d 610, (Ind. Ct. App. 1990), tran. denied (Ind. 1991).

JURISDICTION

An adequate statement of the jurisdictional grounds for this case is contained in the Petition for Writ of Certiorari.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution upon which the Petitioner relies is contained in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The appeal below and this Petition for Writ of Certiorari arise out of a case that was highly contested at the trial level on the issues of liability and damages. The Petitioner, Wilson, alleges that she was injured by the Respondent, Kauffman, as a result of an automobile collision on October 13, 1983.

This case was tried to a jury in the Elkhart Superior Court III in Elkhart County, Indiana in 1989. The trial court impaneled a prospective jury which contained one black individual by the name of Charlie Pulluaim. (R. 490). After the questioning of Pulluaim by Wilson's counsel, the trial judge gave counsel for both parties a card instructing them that any challenge of Pulluaim would have to be for a racially neutral reason. (R. 87 and 490). Counsel for Kauffman questioned Pulluaim and afterwards exercised a peremptory challenge to which Wilson objected. (R. 87-89). A copy of the voir dire examination of Pulluaim by Kauffman's counsel is contained in the Appendix to the Petition for Writ of Certiorari. The trial court held a recess, and counsel were advised to submit their positions in writing. (R. 89). Kauffman's counsel gave three reasons for challenging Pulluaim. First, counsel for Kauffman indicated that Pulluaim did not appear to understand his voir dire questions. Second, Pulluaim admitted that she knew of the Plaintiff, Wilson. Third, counsel for Kauffman believed that the next potential juror, the wife of a retired physician, might be a more qualified juror since much of the case was to be based on medical information. (R. 491). Counsel for Wilson objected to the peremptory challenge of Pulluaim claiming that Kauffman had failed to establish a racially neutral reason for removing Pulluaim and claiming that there was no evidence to show Pulluaim was not fully qualified to serve. (R. 492-93). The trial judge not only found that the reasons given by counsel for Kauffman were racially neutral, but the trial judge also agreed that Pulluaim did not appear to understand the questions posed by Kauffman's counsel. (R. 89, 492, and 547). The trial judge sustained the peremptory challenge and excused Pulluaim. (R. 89 and 492).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied for three reasons. First, no substantial question has been presented for review. The trial and appellate courts below applied the Batson rule in this case with respect to the peremptory challenge of Pulluaim. Thus, the appropriate legal standard was applied. Counsel for Kauffman gave three reasons for the peremptory challenge which the trial court found to be race neutral. The trial court found that the peremptory challenge was not racially motivated and thus sustained it. After noting the deference that should be afforded the trial court's determinations, the Indiana Court of Appeals affirmed. No substantial question has been presented for review as the Petitioner invites this Court to do nothing more than re-apply the Batson rule and re-weigh the evidence and the credibility issues involved with the peremptory challenge.

Second, the Batson test was properly applied. As was held by the Indiana Court of Appeals, Wilson failed to even establish a prima facie case of purposeful discrimination at the trial level as Wilson provided no facts or circumstances to raise an inference of purposeful discrimination. Wilson showed nothing more than the fact that both Wilson and Pulluaim were black. Although not having established a prima facie case, counsel for Kauffman still provided three (3) racially neutral reasons for the peremptory challenge. These reasons were that Pulluaim did not appear to understand the voir dire questions; that Pulluaim knew of the plaintiff, Wilson; and that the next prospective juror, being the wife of a physician, might be more qualified as much of the case was to turn on medical issues. All of the reasons given are race neutral and constitute a sufficient explanation for the exercise of the peremptory challenge. The trial judge not only accepted these reasons as race neutral but also specifically acknowledged the observation and agreed with

Kauffman's counsel that Pulluaim did not appear to understand all of the questions. The trial judge concluded that the peremptory challenge was not racially motivated and therefore sustained it. The determination that the peremptory challenge was not racially motivated is entitled to great deference as it turns on an evaluation of credibility which lies peculiarly within the trial judge's province. As the determination was not clearly erroneous, the exercise of the peremptory challenge should be sustained.

Third, the Petitioner's suggestion that a party exercising a peremptory challenge should be required to provide "clear and convincing evidence" for a peremptory challenge or a "good and sufficient reason" rather than a racially neutral reason is unsound. To elevate the standard in this way would essentially eliminate the use of peremptory challenges which help to assure the selection of a qualified and unbiased jury. In addition, such a standard would create chaos in the jury selection process as parties would spend more time with jury selection issues than on the merits of the case. The current standard under Batson of requiring a racially neutral reason with respect to the exercise of a peremptory challenge is adequate in these cases to protect an individual's due process and equal protection rights. For all of these reasons, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED FOR REVIEW.

Even before this Court held in Edmonson v. Leesville Concrete company, Inc. that the principles announced in Batson v. Kentucky apply to a civil trial, the Indiana Court of Appeals

applied Batson in this case at the appellate level. See Batson v. Kentucky, 476 U. S. 79 (1986); Edmonson v. Leesville Concrete Company, Inc., 111 S. Ct. 2077 (1991). Under the principles announced in Batson, a person alleging racial discrimination and objecting to a peremptory challenge has the initial burden of proving that he or she is a member of a cognizable racial group; that the opposing party has peremptorily challenged members of the objecting party's race; and that these facts and other relevant circumstances raise an inference that the opposing party used this practice to exclude veniremen from the jury because of race. Batson, 476 U.S. at 96. If these elements are proven, the party seeking to exercise the peremptory challenge must come forward with a racially neutral explanation. The explanation must relate to the particular case, but it does not need to rise to the level justifying exercise of a challenge for cause. Batson, 476 U.S. at 97. The trial judge will then have a duty to determine if purposeful discrimination has been established. Batson, 476 U.S. at 98. Contrary to Wilson's contention that the Indiana Court of Appeals improperly placed the burden of proof upon her, the burden of proof is on and has always been on the party alleging the discriminatory selection of the venire to prove the existence of purposeful discrimination. Batson, 476 U.S. at 93.

In this case, the trial judge found that racially neutral reasons were given for the exercise of the peremptory challenge of Pulluaim, and, consequently, sustained that challenge. In affirming the action of the trial court, the Indiana Court of Appeals applied Batson and determined not only that racially neutral reasons were given but also that Wilson failed to establish even a prima facie case of purposeful discrimination. Instead of presenting any substantial question for review in the Petition for Writ of Certiorari, Wilson instead invites this Court to now independently apply the Batson test although it has already been applied as the legal standard in the courts below.

Furthermore, the review sought by Wilson at this time seeks to have this Court in essence place itself in the shoes of the trial judge in weighing the evidence and determining credibility with respect to the issue of racial discrimination. In justifying the peremptory challenge, counsel for Kauffman at the trial level explained that Pulluaim did not appear to understand his questions. The trial judge acknowledged this observation and agreed that Pulluaim did not appear to understand all of the voir dire questions. When making such determinations as to a prospective juror's understanding of questions, instructions, legal principles, and other relevant matters, it is crucial that one have an opportunity to listen to the individual's answers and to personally observe the individual's demeanor. As it is the trial judge who listens to and personally observes voir dire and has the best opportunity to reach these conclusions, a reviewing court should give the trial judge's findings great deference. This Court has long considered a Writ of Certiorari to be an inappropriate vehicle to review factual findings. As stated in National Labor Relations Board v. Pittsburgh Steamship Company,

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498, 503 (1951).

This case is no different than others which turn upon the facts. A racially neutral explanation was given, and the trial judge not only accepted that explanation but also agreed with it. There is sufficient basis in the record to sustain the peremptory challenge.

II. THE BATSON TEST WAS PROPERLY APPLIED.

Applying the Batson standard as stated above, the Indiana Court of Appeals determined that Wilson failed to even establish a prima facie case of purposeful discrimination at the trial level. This determination was based upon Wilson's failure to show any facts that would give rise to an inference that the peremptory challenge was based upon race. Although Wilson and Pulluaim were both black, this circumstance alone did not raise an inference of purposeful discrimination, and Wilson did not come forward with any facts to give rise to such an inference. This determination, however, has little significance at this stage in the case as counsel for Kauffman provided racially neutral reasons for the peremptory challenge. In such circumstances, the preliminary issue of whether a prima facie showing has been made becomes moot. Hernandez v. New York, 111 S.Ct. 1859 (1991).

At the trial level, counsel for Kauffman gave three racially neutral explanations for exercising the peremptory challenge of Pulluaim. The first reason given by Kauffman's counsel was that Pulluaim did not appear to understand his voir dire questions. The trial judge specifically acknowledged and agreed with this observation. The Indiana Supreme Court has held that a prospective juror's difficulty in understanding and following the proceedings and a prospective juror's failure to exhibit a sufficient comprehension of the burden of proof constitute sufficient grounds for the legitimate exercise of a peremptory challenge in cases where racially neutral reasons must be provided. Splunge v. State, 526 N.E. 2d 977, 980 (Ind. 1988); Stamps v. State, 515 N.E. 2d 507, 510 (Ind. 1987). This case parallels those cases in many ways, not the least of which is the fact that Pulluaim did not appear to understand certain portions of the voir dire questions from Kauffman's counsel, especially those dealing with the burden of proof:

MR. ULMER: And will you hold Ms. Wilson to

> the burden that if she's claiming injury she has to establish that they were caused by Mr. Kauffman's conduct?
> MS. PULLUAIM: Yes
> MR. ULMER: And if she does not establish that, she can make no recovery? (No Response.) Well, if the Court would so instruct you that before a plaintiff may recover, the plaintiff is responsible and has the burden of proving that the injuries or damages she claims were caused by the defendant, would you follow that instruction . . .
> MS. PULLUAIM: Yes.
> MR. ULMER: . . . And if she has not established that burden, would you vote to not award her any money?
> MS. PULLUAIM: I would have to hear all of the facts before I could say. (R. 88).

Pulluaim failed to answer one of the voir dire questions. Furthermore, her last response above could be interpreted to mean that she might be swayed by factors other than the evidence such as sympathy, bias, or other extraneous matters. The trial judge agreed with counsel's observation that Pulluaim did not appear to understand the voir dire questions. The explanation given was racially neutral, and the trial judge was in the best position to determine the validity of that explanation.

The second racially neutral reason given by counsel for Kauffman was that Pulluaim knew of Wilson. In Splunge v. State, the Indiana Supreme Court held that it was reasonable for a prosecutor to dismiss a juror that was acquainted with the defendant. Splunge v. State, 526 N.E.2d 977, 980 (Ind. 1988). In Phillips v. State, the Indiana Supreme Court determined that there was nothing in the record to indicate that a prosecutor removed three blacks from the jury panel on the basis of racial

discrimination where it was shown that they were either acquainted with or familiar with a potential witness. Phillips v. State, 496 N.E.2d 87 (Ind. 1986). In this case, Pulluaim admitted on voir dire that she knew of Wilson. Splunge v. State and Phillips v. State stand for the proposition that where a potential juror is "acquainted with" or "familiar with" participants in a trial, that fact will serve as a reasonable and racially neutral reason for excluding the potential juror. Thus, the fact that Pulluaim knew of Wilson was a sufficient reason, and a racially neutral reason, for peremptorily challenging Pulluaim.

Wilson's claim that using this rationale as a basis for a peremptory challenge would necessarily exclude large numbers of minority persons from jury service and would deprive a litigant of the constitutional right to jury selection on other than race-identity qualifications is misguided. First, it is inappropriate to ignore the fact that the reason given is racially neutral. Any individual, regardless of race, could know of a litigant, and in such circumstances, the exercise of a peremptory challenge against one who knows of a litigant would be a reasonable, racially neutral action. Second, Wilson's argument is highly speculative when one considers the fact that potential jurors are selected on a county-wide or district-wide basis and not merely from a small community. Finally, the argument is legally insufficient as one ". . . must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact...'" Hernandez v. New York, 111 S.Ct. 1859 (1991). For all of these reasons, the fact that Pulluaim knew of Wilson was a sufficient racially neutral reason for the peremptory challenge of Pulluaim.

Finally, counsel for Kauffman gave as an explanation for the peremptory challenge that the next prospective juror was the wife of a physician - that a lot of the case turned on medical information. Counsel for Kauffman believed that such a juror

might be more qualified for this case than Pulluaim. "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial." Minniefield v. State, 539 N.E. 2d 464, 466 (Ind. 1989) (emphasis added). Since there was to be a considerable amount of conflicting medical testimony in the trial, counsel for Kauffman felt the individual qualifications of the potential jurors was of great importance. Therefore, Kauffman's counsel concluded that the wife of a retired physician might be more qualified as a juror than Pulluaim; especially since Pulluaim had responded in the negative to the following question from Wilson's attorney: "You don't have any training of any medical type, do you?" (R. 84). While Kauffman's counsel did not question Pulluaim about her medical knowledge, he could rely upon Pulluaim's answer to questions from Wilson's attorney. While the Indiana Court of Appeals noted that this third reason for challenging Pulluaim might not have been sufficient to show the reason was not racially motivated because Kauffman could have struck any of the prospective jurors in order to assure the physician's wife was on the panel, the Court of Appeals did so without the knowledge that "backstriking" was not allowed. Under the local rules of the trial court, Kauffman would not have been permitted to strike any of the jurors that had already been seated on the panel. As Pulluaim was the last or one of the last jurors that would have been seated, Kauffman would not have been able to strike any of the jurors in order to assure that the physician's wife would be on the panel. For all of these reasons, the third explanation given by counsel for Kauffman was a racially neutral reason which supports the peremptory challenge of Pulluaim.

Wilson's argument that the Indiana Court of Appeals improperly placed the burden of proof upon her to show racial discrimination is without merit. Under Batson, the burden of proving a prima facie case as well as the ultimate burden of

proving purposeful discrimination is upon the party who alleges discrimination. Batson v. Kentucky, 476 U.S. 79, 93 (1986); Hernandez v. New York, 111 S.Ct. 1859 (1991). In this case, three independent racially neutral reasons were given for the peremptory challenge of Pulluaim. As stated by this Court in Hernandez,

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. Hernandez, 111 S.Ct. 1859 (1991).

The trial court judge concluded that the exercise of the peremptory challenge was not racially motivated and sustained it. The Indiana Court of Appeals likewise found that the peremptory challenge was not racially motivated and affirmed the decision of the trial judge. As stated in Hernandez, the trial court findings on the issue of discriminatory intent largely turn on an evaluation of credibility which lies peculiarly within a trial judge's province. Hernandez, 111 S.Ct. 1859. The trial judge's determination is entitled to great deference and is to be reviewed on the basis of a clearly erroneous standard. As shown above, there was no error committed by the trial judge nor by the Indiana Court of Appeals and, thus, the Petition for Writ of Certiorari should be denied.

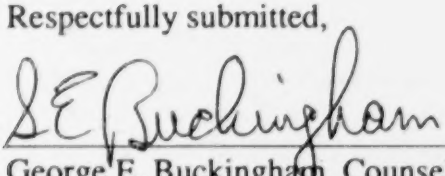
III. THE APPLICATION OF THE RULE SUGGESTED BY WILSON WOULD LEAD TO CHAOS IN THE JURY SELECTION PROCESS AND NEVER-ENDING LITIGATION IN CONNECTION WITH THE SELECTION OF A JURY.

At several points in the Petition for Writ of Certiorari, Wilson suggests that the standard of a racially neutral reason for a peremptory challenge should be elevated to one requiring "clear and convincing evidence" for the peremptory challenge or a "good and sufficient reason." (Petition for Writ of Certiorari, pp.14-15). To elevate the standard in such a way for the exercise of a peremptory challenge in cases where discrimination is alleged in the jury selection process would essentially eliminate the use of peremptory challenges altogether. To do so would be unwise as peremptory challenges have traditionally been viewed as a means of assuring the selection of a qualified and unbiased jury. Batson, 476 U.S. at 91. Such a standard would create chaos in the jury selection process and lead to unending challenges, issues, and appeals over the legal parameters of the standard and the legal sufficiency of the reasons and the evidence used to exercise a challenge. Rather than focusing on the merits of the case, the selection of the jury would become a preeminent issue. Appeals would be the rule of the day as parties appealed the constitution of the jury created by the peremptory challenges that were either allowed or disallowed. Creating such chaos, however, is not necessary as the current standard requiring a racially neutral reason for the exercise of a peremptory challenge in such cases is adequate to protect an individual's due process and equal protection rights.

CONCLUSION

For all of the foregoing reasons, the Respondent, Ledger D. Kauffman, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

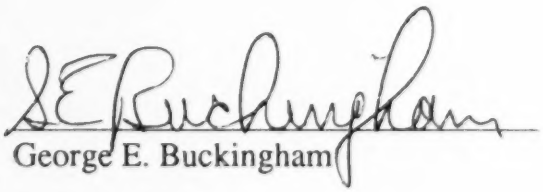


George E. Buckingham, Counsel of Record
John D. Ulmer, Attorney for Respondent
Craig M. Buche, Attorney for Respondent
YODER, AINLAY, ULMER & BUCKINGHAM
130 North Main Street
P.O. Box 575
Goshen, Indiana 46526-0575
Telephone: (219) 533-1171

PROOF OF SERVICE AND FILING

The undersigned, George E. Buckingham, Counsel of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 25th day of October, 1991, he served counsel for the Petitioner, Charles C. Wicks, at 514 S. Main Street, P.O. Box 1884, Elkhart, Indiana 46515 with three (3) copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari in accordance with Supreme Court Rule 29.3 and 29.5 by depositing the same in United States mail with first class postage prepaid and properly addressed.

The undersigned, George E. Buckingham, Counsel of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby further certifies that on the 25th day of October, 1991, he filed forty (40) copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari, which is within the time allowed for the filing of said Brief, by depositing the same in United States mail, with first class postage prepaid, and properly addressed to the Honorable William K. Suter, Clerk, Supreme Court of the United States, Washington D.C. 20543 all in accordance with Supreme Court Rule 29.2



George E. Buckingham